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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1792

BOARD OF TRUSTEES OF
KEENE STATE COLLEGE, ET AL.,
Petitioners,

v.

CHRISTINE M. SWEENEY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AS AMICUS CURIAE IN SUPPORT OF PETITION

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INDEX

PAGE

MOTION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITION 1

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION AS AMICUS CURIAE IN SUPPORT OF PETITION 1

INTEREST OF AMICUS 1

QUESTION PRESENTED 1

A WRIT OF CERTIORARI SHOULD BE GRANTED IN ORDER TO DETERMINE THE SCOPE OF REVIEW BY THE JUDICIARY OF PEER REVIEW DECISIONS IN ACADEMIC EMPLOYMENT CASES UNDER TITLE VII 2

A. The scope of review used by the court below represents a radical departure from the scope of review used by other courts in academic employment cases under Title VII 3

B. The court below failed to give weight to the well-established constitutional principle of restraint in cases involving academic evaluation 9

C. The public interest in the integrity of the nation's institutions of higher education requires that this Court determine the appropriate role of the judiciary in cases involving academic judgments 12

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

PAGE

Board of Curators of the University of Missouri v. Horowitz, No. 76-695 (decided March 1, 1978) .11

Cussler v. University of Maryland, 430 F. Supp. 602 (D. Md. 1977) 5, 13

Epperson v. Arkansas, 393 U.S. 97 (1968) 10

Faro v. New York University, 502 F. 2d 1229 (2d Cir. 1974) 4, 8

Goss v. Lopez, 419 U.S. 565 (1975) 11

Green v. Board of Regents, Texas Tech University, 474 F. 2d 594 (5th Cir. 1973).....3

Healy v. James, 408 U.S. 169 (1972) 10

Johnson v. University of Pittsburgh, 435 F. Supp. 1328 (W.D. Pa. 1977), dissolving injunction granted at 359 F. Supp. 1002 (W.D. Pa. 1973) 5, 7, 12

Keyes v. Lenoir Rhyne College, 552 F. 2d 579 (4th Cir. 1977), *cert. denied* 46 U.S.L.W. 3258 (Oct. 18, 1977).....5

Keyishian v. Board of Regents, 385 U.S. 589 (1967)..10

Lewis v. Chicago State College, 299 F. Supp. 1357 (N.D. Ill. 1969) 5

McConnell v. Anderson, 451 F. 2d 193 (8th Cir. 1971) 4

Meyer v. Nebraska, 262 U.S. 390 (1923).....9

N.L.R.B. v. Yeshiva University, Civ. No. 77-4182 (2d Cir. July 31, 1978) 2

Peters v. Middlebury College, 409 F. Supp. 857 (D. Vt. 1976).....5

PAGE

Powell v. Syracuse University, 17 EPD Para. 8468 (2d Cir. July 13, 1978) 8

Presseisen v. Swarthmore College, 442 F. Supp. 593 (E.D. Pa. 1977) 5

Sweezy v. New Hampshire, 354 U.S. 234 (1957) 10

University of California Regents v. Bakke, No. 76-811 (decided June 28, 1978) 10

Statutes

Civil Rights Act of 1871, 42 U.S.C. §1983 .... 3, 11, 13

Equal Employment Opportunity Act of 1972, *amending* 42 U.S.C. §§2000e *et seq.* 3

National Labor Relations Act, 29 U.S.C. §§151 *et seq.* 2

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* ..... *passim*

Other

U.S. Const. Am. 1 10

U.S. Const. Am. 14 .....10, 11

Keast, *Faculty Tenure: A Report and Recommendations by the Commission on Academic Tenure in Higher Education* (San Francisco: Jossey-Bass, 1973), p. 25 2

Knowles, ed., "Academic Freedom," entry in *The International Encyclopedia of Higher Education* (San Francisco: Jossey-Bass, 1977), Vol. 2A, p. 24 9

Shulman, *Federal Laws: Nondiscrimination and Faculty Employment* (Washington: American Association for Higher Education, 1975) 12

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MOTION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States (rev. 1971), the American Council on Education respectfully moves this Court for permission to file a brief *amicus curiae* in support of the petition for a writ of certiorari in No. 77-1792, and conditionally files the following brief.

The American Council on Education is a nonprofit corporation organized under the laws of, and located in, the District of Columbia. Founded in 1918, the Council is a membership organization composed of 1,291 nonprofit institutions of higher education from both the public and private sectors and 169 educational associations and organizations. Its work is financed by membership dues and by grants from foundations and learned and professional societies.

The Council is the nation's major coordinating body in postsecondary education. As an organization whose members include the overwhelming majority of nonprofit four-year colleges and universities, it is uniquely able to represent the interests of higher education generally on matters of national importance. The Council believes that one of the legal questions presented in this case is of critical importance to American colleges and universities, namely what is the appropriate scope of review by the judiciary of peer review decisions in academic employment cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*

The Council takes no position with respect to the allegations of discrimination on the basis of sex in this case, and has no interest in the disposition of the case insofar as the individual respondent is concerned. Rather, its concern is for maintenance of the independence and integrity of the academic enterprise. That independence and

integrity, on which the survival of our political system depends, is gravely threatened by judicial decisions such as that of the court below in this case.

Granting of this motion will ensure that the Court views this case in its proper perspective, as a case involving vital national interests that transcend the dispute over whether or not Christine Sweeney was unlawfully denied promotion by Keene State College because of her sex. Whether or not a court should substitute its judgment of an individual's academic qualifications or performance for that of duly-constitute peer review bodies is certainly a question worthy of the Court's attention.

For the foregoing reasons, the American Council on Education respectfully requests that its motion for permission to file a brief *amicus curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit be granted, and conditionally files the following brief.

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Interest of Amicus

The American Council on Education is a nonprofit corporation organized under the laws of, and located in, the District of Columbia. Founded in 1918, the Council is a membership organization composed of 1,291 nonprofit institutions of higher education from both the public and private sectors and 169 educational associations and organizations. Its work is financed by membership dues and by grants from foundations and learned and professional societies.

The Council is the nation's major coordinating body in postsecondary education. As an organization whose members include the overwhelming majority of nonprofit four-year colleges and universities, it is uniquely able to represent the interests of higher education generally on matters of national importance. The Council believes that one of the questions presented in No. 77-1792 is of critical importance to American colleges and universities, and it therefore conditionally files the following brief.

Question Presented

The sole question addressed by *amicus* in its brief is the scope of review by the judiciary of peer review decisions in academic employment cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*

A Writ of Certiorari Should Be Granted in Order To Determine the Scope of Review by the Judiciary of Peer Review Decisions in Academic Employment Cases Under Title VII

At most American colleges and universities, decisions or effective recommendations concerning faculty employment matters, such as hiring, promotion, and the award of tenure, are made by committees comprised of a faculty member's peers, who are uniquely able to make judgments concerning his or her academic qualifications and performance.[1] Such delegation of authority by an institution's governing board and chief administrative officers renders institutions of higher education unique among employers covered by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*[2]

Although this Court has not yet undertaken to decide a faculty employment case under Title VII, several such cases have been decided by the lower federal courts. The decision of the court below in this case is not consistent with the decisions of the other courts that have ruled concerning the scope of review by the judiciary of academic peer review judgments. A writ of certiorari should therefore be granted in order to resolve the resulting conflict among the circuits and to dispel the uncertainty which this maverick decision has created.

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[1] Keast, *Faculty Tenure: A Report and Recommendations by the Commission on Academic Tenure in Higher Education* (San Francisco: Jossey-Bass, 1973), p. 24.

[2] The extent to which the decisionmaking process concerning employment matters differs between the academic world and the world of business and industry was dramatically illustrated in a recent decision of the Second Circuit holding that faculty members who participate in a collegial system of academic governance are "managerial personnel" rather than "employees" within the meaning of the National Labor Relations Act, 29 U.S.C. §§151 *et seq.* and therefore have no right to engage in protected, concerted activity under that Act. *NLRB v. Yeshiva University*, Civ. No. 77-4182 (2d Cir. July 31, 1978).

A. *The scope of review used by the court below represents a radical departure from the scope of review used by other courts in academic employment cases under Title VII:*

Title VII of the Civil Rights Act of 1964 provides in section 703, 42 U.S.C., §2000e-2, as follows:

> (a) It shall be an unlawful employment practice for an employer
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to this compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

In 1972, Title VII was amended to cover the employment practices of educational institutions for the first time, effective March 24, 1972.[3]

Prior to extension of Title VII to cover educational institutions, cases alleging violation of the civil rights of employees at state institutions of higher education had arisen under the Civil Rights Act of 1871, 42 U.S.C. §1983. In such cases, the principle that a court should not substitute its judgment of an individual's academic qualifications or performance for that of duly-constituted academic bodies was well-established. *Green v. Board of Regents, Texas Tech University*, 474 F. 2d 594 (5th Cir.

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[3] Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103 (1972), *amending* Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 253 (1964), 42 U.S.C. §§2000e *et seq.*

1973); *McConnell v. Anderson;* 451 F. 2d 193 (8th Cir. 1971), *cert. denied* 405 U.S. 1046 (1972). In *McConnell,* the court stated (at 195):

> That a court is, in reviewing a determination of an administrative body, limited to deciding whether the administrative action was arbitrary, unreasonable or capricious long has been settled. This particularly must be so, it seems to us, where, as here, the determination under challenge is one falling within the considerable discretion entrusted those charged with the heavy responsibility of supervising the administration of this nation's colleges and universities.

A similar approach of judicial restraint has been adopted in cases arising under Title VII. The first, and still the leading, decision of a circuit court is *Faro v. New York University,* 502 F. 2d 1229, 1231 (2d Cir. 1974), where the court made the following oft-quoted statement:

> Of all fields which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision. Dr. Faro would remove any subjective judgments by her faculty colleagues in the decision-making process by having the courts examine "the university's recruitment, compensation, promotion and termination [procedures] and by analyzing the way these procedures are applied to the claimant personally." All this information she would obtain "through extensive discovery, either by the EEOC or the litigant herself." This argument might well lend itself to a *reductio ad absurdum* rebuttal. Such a procedure, in effect, would require a faculty committee charged with recommending or withholding advancements or tenure appointments to subject itself to a court inquiry at the behest of unsuccessful and disgruntled candidates as to why the unsuccessful was not as well qualified as the successful. This decision would then be passed on by a Court of Appeals or even the Supreme Court. The process might be simplified by a legislative enactment that no faculty appointment or advancement could be made without the committee obtaining a declaratory judgment naming the successful candidate after notice to all contending candidates to present their credentials for court inspection and decision.

In *Keyes v. Lenoir Rhyne College,* 552 F. 2d 579 at n. 6 (4th Cir. 1977), *cert. denied,* 46 U.S.L.W. 3258 (1977), the court expressed relief that, because the college had been able to demonstrate that any disparity in salary between males and females was based upon legitimate and nondiscriminatory factors, it was not necessary for the court to review individual evaluations: "Such evaluations are necessarily judgmental, and had the college seen fit to rely upon them we would be faced with the delicate question of whether the court should 'substitute its judgment for the rational and well-considered judgment of those possessing expertise in the field.' [citations to *Green* and *Faro* omitted]."

The federal district courts, to which fall the onerous task of fact-finding in these cases, have been uniform in refusing to overturn the judgments of peer review committees in faculty cases. See *Presseisen v. Swarthmore College,* 442 F. Supp. 593 (E.D. Pa. 1977); *Johnson v. University of Pittsburgh,* 435 F. Supp. 1328 (W.D. Pa. 1977), dissolving preliminary injunction granted at 359 F. Supp. 1002 (W.D. Pa. 1973); *Cussler v. University of Maryland,* 430 F. Supp. 602 (D. Md. 1977); and *Peters v. Middlebury College,* 409 F. Supp. 857 (D. Vt. 1976). See also *Lewis v. Chicago State College,* 299 F. Supp. 1357 (N.D. Ill. 1969). In *Cussler,* the court stated:

> As the courts repeatedly have noted, promotion decisions in academia necessarily involve matters of professional judgment . . . The courts are, therefore, reluctant to substitute their judgment for the judgment of academics with expertise in their respective fields.

And, in *Johnson,* the same conclusion was reached:

> Plaintiff has pointed to no such case in the federal system in a proceeding under Title VII where the court has ordered a college professor to be promoted and be given tenure over the judgment of the professionals in academia. The principles above cited are recognized unanimously by all the courts, with the qualification of course "absent impermissible sex discrimination."

In each of these cases the district court, unable to find sufficient evidence of impermissible sex discrimination, ruled that the unfavorable employment decision at issue was motivated by legitimate and reasonable nondiscriminatory factors.

It is within the context of this considerable body of case law construing Title VII that the decision of the court below must be viewed. The court openly conceded that its approach was out of line with that of every other federal court that has ruled in a faculty case under Title VII:

> Of course, legislative sympathy for the plight of female college teachers does not alleviate Dr. Sweeney's obligation to prove herself the victim of sex discrimination in order to recover under Title VII. In fact, the difficulty of her task is underlined by the lack of cases in which plaintiffs have succeeded in similar challenges to sex discrimination in academia. Admittedly, most if not all of these female plaintiffs have lost. [citations omitted] ... Whether the evidence presented in these cases fell significantly short of the evidence in this case we do not know. However, we voice misgivings over one theme recurrent in those opinions: the notion that courts should keep "hands off" the salary, promotion, and hiring decisions of colleges and universities. 569 F. 2d at 175-176.

Amicus submits that it is not an accurate reading of the cases cited that courts should keep "hands off" faculty employment decisions. Rather, these cases stand for the proposition that, *in the absence of any evidence of impermissible sex discrimination*, a court should not substitute its judgment of an individual's qualifications or

performance for that of the appropriate experts in the faculty member's field of expertise. That point was clearly made in *Johnson v. University of Pittsburgh, supra,* where, after 74 days of trial, the court found insufficient evidence of discrimination and concluded (at 1371):

> This has been a long and exhausting piece of litigation posing many difficulties for the court as well as for counsel. The case has been thoroughly and exhaustively tried if not over tried by able counsel on both sides. The court is thoroughly appreciative of the important and serious issues involved in this case. On the one hand we have the important problem as to whether sex discrimination is operating to the detriment of women in the halls of academia. If so Congress has mandated that it must be eradicated. Colleges and universities must understand this and guide themselves accordingly. On the other hand we also have the important question as to whether the federal courts are to take over the matter of promotion and tenure for college professors when experts in the academic field agree that such should not occur.
>
> In determining qualifications in such circumstances the court is way beyond its field of expertise and in the absence of a clear carrying of the burden of proof by the plaintiff, we must leave such decisions to the PhDs in academia.

It can hardly be maintained that the court's attitude in *Johnson* was one of "hands off."

Judge Campbell of the First Circuit was sufficiently concerned about the tone of the court's opinion in this case to write a concurring opinion. He stated, "I agreed with the result, but the tone of the court's opinion leaves me uneasy. By emphasizing the 'importance' of the instant case and then dealing with such collateral questions as . . . the duty of courts not to defer unduly to universities' personnel policies, an impression is generated that this circuit may endorse the use of a sword rather than a scalpel in cases of this delicate nature." 569 F. 2d at 180.

Since the First Circuit's ruling in this case, the Second Circuit has had occasion to comment upon the effect of its decision in *Faro, supra*. In *Powell v. Syracuse University*, 17 EPD Para. 8468 (2d Cir. July 13, 1978), the defendant university was found to have had a legitimate nondiscriminatory reason for terminating the employment of a female faculty member. Notwithstanding the outcome of the case, the court cautioned against extension of *Faro* "beyond all reasonable limits":

> In recent years, many courts have cited the *Faro* opinion for the broad proposition that courts should exercise minimal scrutiny of college and university employment practices. Other courts, while not citing *Faro*, have concurred in its sentiments.
>
> This anti-interventionist policy has rendered colleges and universities virtually immune to charges of employment bias, at least when that bias is not expressed overtly. We fear, however, that the common-sense position we took in *Faro*, namely that courts must be ever-mindful of relative institutional competencies, has been pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of the Civil Rights Act of 1964. In affirming here, we do not rely on any such policy of self abnegation where colleges are concerned . . .
>
> It is our task, then, to steer a careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior. *Faro* does not, and was never intended to, indicate that academic freedom embraces the freedom to discriminate.

As in the present case, a concurring member of the three-judge panel was constrained to object to the majority's comments about the proper role of the courts in cases of this nature.

These two cases point up the confusion which now exists as to how the courts should handle sex discrimination cases involving academic institutions. The

resulting uncertainty within the higher education community would be dispelled if this Court were to grant a writ of certiorari in order to determine the scope of review in academic employment cases arising under Title VII.

B. *The court below failed to give weight to the well-established constitutional principle of restraint in cases involving academic evaluation.*

The decision of the court below in this case failed to take into account the numerous pronouncements of this Court over the years concerning the national interest in academic freedom. "Academic freedom" in the traditional sense has been defined[4] as follows:

> Academic freedom is the freedom of the teacher within his or her field of study. It is a safeguard that allows researchers and teachers in institutions of higher learning to pursue their work without the inhibition, prohibition, or direction of political, ecclesiastical, or other administrative authorities, regardless of their personal philosophies, behavior, or life-style. It is liberty granted to these individuals to assure them the opportunity for examination and challenge of doctrines, dogma, and received opinions in the interest of advancing knowledge for the benefit of all society.

Academic freedom has long been a major tenet of our American democratic faith. It, like other such tenets, is embedded in our constitutional law. Academic freedom has been construed to encompass a variety of elements: freedom to provide instruction in a foreign language (*Meyer v. Nebraska*, 262 U.S. 390 (1923)); freedom to express unpopular political beliefs in the classroom

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[4] "Academic Freedom," entry in Knowles, ed., *The International Encyclopedia of Higher Education* (San Francisco: Jossey-Bass, 1977), Vol. 2A, p. 24.

(*Sweezy v. New Hampshire*, 354 U.S. 234 (1957)); freedom to refuse to take a loyalty oath (*Keyishian v. Board of Regents*, 385 U.S. 589 (1966)); freedom to teach religiously unorthodox scientific theories (*Epperson v. Arkansas*, 393 U.S. 97 (1968); and freedom of students to organize an education-related extracurricular activity (*Healy v. James*, 408 U.S. 169 (1972)).

Academic freedom in its purest sense must be grounded in the freedom of academic institutions to fulfill their missions of teaching, research and service in an environment free of governmental interference with matters of educational policy. Justice Frankfurter acknowledged this necessity when he described "the four essential freedoms" of a university as "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire, supra,* at 263.

In its recently completed term, this Court decided two cases involving institutions of higher education which reaffirm the constitutional interest in academic freedom under the First Amendment and the due process clause of the Fourteenth Amendment. In *University of California Regents v. Bakke,* ____ U.S.____ (No. 76-811, decided June 28, 1978), Justice Powell, in finding that the attainment of a diverse student body is a constitutionally permissible goal under the equal protection clause, looked to the First Amendment's concern for academic freedom: "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." (slip op. at 42). Justice Powell also noted that a university must have wide discretion in making sensitive judgments as to who should be admitted. (slip op. at 45).

This Court's treatment of matters of academic judgment in *Board of Curators of the University of Missouri v. Horowitz,* ____ U.S. ____ (No. 76-695, decided March 1, 1978), is even more instructive in the present case. In *Horowitz,* a student in her final year of medical school at a state university was dismissed for failure to meet required academic standards with respect to clinical practice. She brought suit under the Civil Rights Act of 1871, 42 U.S.C. §1983, alleging that the school's failure to grant her a hearing prior to her dismissal violated her rights under the due process clause of the Fourteenth Amendment. In holding that a formal hearing was not required under the circumstances of the case, the Court distinguished between dismissals for disciplinary cause, *Goss v. Lopez,* 419 U.S. 565 (1975), and dismissals for academic cause:

> The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking. (slip op. at 11).

In his concurring opinion, Justice Powell made a similar point: "University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation." (slip op. at n. 6).

Amicus submits that the same holds true *a fortiori* with regard to judgments concerning the academic performance of faculty members and their entitlement to promotion or tenure. Yet, the court below gave no weight to this constitutional interest in interpreting Title VII. A writ of certiorari should be issued in order for this Court to balance the well-established constitutional interest in academic freedom with an individual's right to be free of discrimination on the basis of sex. Such balancing would result in the fashioning of a uniform standard of judicial review for future faculty cases arising under Title VII.

C. *The public interest in the integrity of the nation's institutions of higher education requires that this Court determine the appropriate role of the judiciary in cases involving academic judgments.*

As the college-age population in this nation declines, and as the number of unemployed or underemployed Ph.D.'s increases, litigation over employment decisions at institutions of higher education can be expected to increase.[5] Monumental problems would be posed for colleges and universities if they had to defend lawsuits in which the entire peer review process had to be reconstructed in order for a court to arrive at its own judgment concerning an individual's qualifications. Even in cases in which the court is appropriately aware of the limitations of its expertise, the time and expense involved in trying a faculty case under Title VII can be enormous. Judge Knox made the following observations at the beginning of his decision in *Johnson v. University of Pittsburgh, supra,* at 1332:

[5] See Shulman, *Federal Laws: Nondiscrimination and Faculty Employment* (Washington: American Association for Higher Education, 1975), p. 22.

> The forecast as to the complex and protracted nature of the case although not a class action has been borne out by subsequent events. The case was tried nonjury before the court, plaintiff having waived her rights to jury trial with respect to causes of action for damages under the Civil Rights Acts 42 U.S.C. 1983 and 1985 (3). Trial on the merits occupied the court for a period of 74 days during seventeen weeks. 12,085 pages of testimony were taken, 73 witnesses were heard, some of them being on the stand for many days, and close to 1,000 exhibits were received in evidence. During the trial, the court has been required to make excursions through the very frontiers of human knowledge in the ever advancing field of biochemistry. The case is also an example of the devastating effects of sex discrimination cases of this kind against universities upon the work and calendars of the United States courts, and the commitments and time of trial counsel. Attempts to curtail the case proved fruitless in view of plaintiff's claim, for which there appeared to be a reasonable basis that because of sex discrimination males had been hired and promoted in her department who were less qualified than she was to receive promotion and tenure. This necessitated the examination of the professional credentials of numerous professors, a task for which the court like probably most federal judges was ill suited. The case of *Cussler v. University of Md.* 430 FS 602 (D. Md. April 14, 1977) is another illustration of the problems posed by a case of this kind.

Amicus believes that both higher education and the federal judiciary would benefit from a limited and well-defined role for the courts in faculty employment cases brought under Title VII. Congress' mandate of nondiscrimination under that statute can be carried out through an exhaustive search for evidence of disparate treatment without involving the judiciary in the assessment of applicants' or employees' relative qualifications. *Amicus* urges this Court to grant a writ of certiorari in No. 77-1792 in order to define the appropriate role of the judiciary in cases involving academic judgments.

Conclusion

For the foregoing reasons, *amicus curiae* respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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